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### Workmen's Compensation Law--Constitutionality of Supplemental Recovery from Tort Feasors

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decision.<sup>14</sup> In this case there was a contract of insurance containing the usual condition that notice should be immediately given, a breach thereof, followed by acts amounting to a waiver, *which was in turn followed by the negotiation of a "non-waiver" agreement*. The agreement recited that the insurance company

"By undertaking the investigation and defense, *of the suit instituted by the injured party against the insured, does not waive* any condition of the policy \* \* \* and in the event of any claim or suit under said policy, for indemnity or for any other purpose, it shall not be claimed that the said insurance company *has* by an act or conduct waived any provision or condition of its policy or that it is estopped from setting up any defense or defenses it may have."

It was held that continuance in the action brought by the injured party against the insured, by the insurance company with knowledge of the breach, constituted a waiver, and as the defendant was bound to defend at the time of the execution of the non-waiver agreement, the implied promise to continue in defense was no consideration.

True, there was no consideration, but a waiver need not be supported by consideration.<sup>15</sup> Was not the signing of the agreement by the insured an express declaration to waive the right it had to rely on the waiver of its breach by the insurance company?

It seems that the Court did not exhaust all the possibilities of the defense for there is the strongest possible evidence,—a written agreement—of "an intentional relinquishment of a known right"<sup>16</sup> by the plaintiff.

The apparent inclination to favor the insured as reflected in the innumerable cases on the subject of insurance should not outweigh the logical results of sound judicial reasoning.

SYDNEY J. TAYLOR.

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#### WORKMEN'S COMPENSATION LAW—CONSTITUTIONALITY OF SUPPLEMENTAL RECOVERY FROM TORT FEASORS.

The general scheme of the Workmen's Compensation Law has been repeatedly upheld by the highest court of this state and the

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<sup>14</sup> 226 A. D. 516 (1st Dept., 1929).

<sup>15</sup> *Supra* Notes 7, 10.

<sup>16</sup> *Rice v. Fidelity & Deposit Co. of Maryland*, 103 Fed. 427 (C. C. A. 8th, 1900); *Kent v. Warner*, 94 Mass. 536 (1868); *West v. Platt*, 127 Mass. 372 (1897); *Dawson v. Shillock*, 29 Minn. 191, 12 N. W. 526 (1882); *Portland Ry. Co. v. Spillman*, 23 Ore. 587, 32 Pac. 688 (1893); *Hecht v. Brandus*, 4 Misc. 58, 23 N. Y. Supp. 1004 (1893); *Krivitsky S. Cohen, Inc. v. Western Union*, 129 Misc. 431, 221 N. Y. Supp. 525 (1927); *Ansorge v. Belfer*, 248 N. Y. 145, 161 N. E. 450 (1928); *Boynton v. Brailey*, 54 Vt. 92 (1881).

Supreme Court of the United States.<sup>1</sup> Yet individual sections thereof continue to be challenged as to their constitutionality.

In a recent decision, *Phoenix Indemnity Co. v. The Staten Island Rapid Transit Railway Co.*,<sup>2</sup> the validity of Subdivisions 8 and 9 of Section 15<sup>3</sup> and Section 29<sup>4</sup> of the Workmen's Compensation Law was in question. In this case the defendant, a third party, caused the death of an employee of plaintiff's insured. His widow elected to proceed against the present defendant instead of accepting the compensation award. A settlement was effected by which the widow received \$15,000, which was more than she would have been entitled to under the Compensation Law. Defendant at that time received a general release in full settlement of all claims. Plaintiff, thereafter, had to pay \$500.00 into each of two special funds provided for by Subdivisions 8 and 9 of Section 15 and now seeks to recover the sums thus expended, from the defendant, relying on Section 29 of the Compensation Law.<sup>5</sup>

The particular question presented by the case is whether or not the Legislature is prevented by constitutional limitation from imposing the burden of contributing to these special funds on a third person in no industrial relationship to the deceased and thereby impose an additional liability on a tortfeasor after he has obtained a general release in full settlement of all claims arising from his wrongful act.

The right of the state to create such funds for additional compensation in particularly needy cases and for vocational rehabilitation

<sup>1</sup> *N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. Rep. 247, 61 L. ed. 667 (1916); *Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600 (1915), *rev'd* on other grounds 244 U. S. 205, 37 Sup. Ct. Rep. 524, 61 L. ed. 1086 (1916).

<sup>2</sup> 251 N. Y. 127, 2 N. E. 194 (1929), *aff'd* 224 App. Div. 346, 230 N. Y. Supp. 747 (1928).

<sup>3</sup> Sec. 15. *Schedule in Case of Disability*. The following schedule of compensation is hereby established. \* \* \*

8. *Permanent total disability after permanent partial disability*. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one eye, incurs permanent disability through the loss of another member or organ, he shall be paid, in addition \* \* \* out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund and the commissioner shall direct the distribution thereof.

9. (Provides for the expenses of rehabilitating injured employees and requires the insurance carrier to pay to the state treasurer the sum of \$500. under the same terms as contained in subd. 8 above.)

<sup>4</sup> Sec. 29. *Subrogation to remedies of employees*. \* \* \* In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action.

<sup>5</sup> *Supra* Note 4.

has been previously upheld.<sup>6</sup> In *Sheehan v. Shuler*,<sup>7</sup> appellant had insisted that enforced contributions into these funds by a stranger to the industrial relationship existing between employer and employee was in violation of the "due process" and "equal protection" clauses of the United States Constitution. The Supreme Court, however, held that these funds which served as additional compensation in particularly needy cases were necessary to further the benevolent purposes of the Compensation Law and that enforced contributions up to the amount of \$1,000.00 from employers or their insurance carriers were not unjust nor unreasonable when such employer or insurer was not forced to pay compensation to anyone else. The amount thus contributed is less than the average amount the employer or insurer would be obliged to pay if there were dependents taking. This case conclusively decided that the provisions were not in conflict with the "due process" and "equal protection" clauses.<sup>8</sup> That these particular subdivisions are permitted by and do not violate Article I Section 19 of the New York State Constitution had been previously decided.<sup>9</sup>

Payments into the funds have been enforced although the decreased left dependents entitled to compensation awards when such dependents have not claimed death benefits<sup>10</sup> or have recovered damages in excess of compensation from a third party<sup>11</sup> or have failed to receive death benefits because their claims were not filed within the statutory period<sup>12</sup> and even though the injured employee received compensation but died leaving no dependents.<sup>13</sup>

Unquestionably the creation of these funds was within the prerogative of the Legislature and should have been and was correctly upheld to further the humanitarian purposes of the Compensation Law.<sup>14</sup> But the Legislature, through the medium of Section 29, has advanced further, and has created a new liability, imposing on the wrongdoer additional liability when the situation comes within the purview of this section.

<sup>6</sup> *Watkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N. Y. Supp. 278 (3rd Dept., 1921), *aff'd* 231 N. Y. 562, 132 N. E. 889, 20 A. L. R. 1003 (1921); *R. E. Sheehan Co. v. Geo. K. Shuler, State Treasurer, et al.*, 236 N. Y. 579, 142 N. E. 291 (1923), *aff'd* 265 U. S. 371, 44 Sup. Ct. Rep. 548 (1924).

<sup>7</sup> *Supra* Note 6.

<sup>8</sup> *N. Y. State Ry. Co. v. Shuler*, 265 U. S. 379, 48 Sup. Ct. Rep. 551, 68 L. ed. 1064 (1924).

<sup>9</sup> *State Industrial Commission v. Newman*, 222 N. Y. 363, 118 N. E. 794 (1918).

<sup>10</sup> *State Treas. v. West Side Trucking Co.*, 198 App. Div. 432, 191 N. Y. Supp. 346 (3rd Dept., 1921), *aff'd* 233 N. Y. 202, 135 N. E. 244 (1922).

<sup>11</sup> *Miller v. Rochester Gas and Elec. Co.*, 206 App. Div. 723 (3rd Dept., 1923).

<sup>12</sup> *Laird v. Sterling Oil Co.*, 207 App. Div. 878, 201 N. Y. Supp. 917 (3rd Dept., 1923); *Brectinger v. Sens*, 207 App. Div. 880, 201 N. Y. Supp. 946 (3rd Dept., 1923).

<sup>13</sup> *Steuffer v. Rheinfank Co.*, 190 App. Div. 163, 179 N. Y. Supp. 659 (3rd Dept., 1919).

<sup>14</sup> *Supra* Note 6.

At common law there was no civil action surviving the deceased for his wrongful death.<sup>15</sup> The right of action for such death is created solely by statute.<sup>16</sup> Within constitutional limitations statutes are the exclusive sources and boundary of liability for damages for wrongful death and the remedy.<sup>17</sup> They may create the cause of action, define the period of its existence and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries.<sup>18</sup>

The United States Supreme Court has held that constitutional rights, like others, are matters of degree and provisions for the protection of property are not to be pushed to a logical extreme but must be taken to permit the infliction of some relatively small losses without compensation for some of the purposes of wholesome legislation.<sup>19</sup>

"Any plan devised by the will of man may, in exceptional cases, work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it."<sup>20</sup>

The various Workmen's Compensation Laws imposing new liabilities are familiar examples of the legislative creation of new rights and duties for the prevention of evils arising out of our highly developed industrial age or for satisfying social and economic needs:

"Their constitutionality may not be successfully challenged merely because a change in the common law is effected. \* \* \* We cannot say it is beyond the power of the Legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability, \* \* \* not only upon those at fault but upon those who, although not directly culpable, are able, nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented."<sup>21</sup>

It is within the power of the Legislature to create a new cause of action unknown to the common law. In our opinion it is

<sup>15</sup> *Meekin v. Brooklyn Heights R. R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235 (1900).

<sup>16</sup> *Travelers Ins. Co. v. Podula*, 224 N. Y. 397, 121 N. E. 348 (1918); *In re Meng*, 227 N. Y. 264, 125 N. E. 508 (1919); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465 (1861); *Hamilton v. Erie R. R. Co.*, 219 N. Y. 343, 114 N. E. 399, Ann. Cases 1918A, 928 (1916).

<sup>17</sup> *Supra* Note 16.

<sup>18</sup> *Supra* Note 16.

<sup>19</sup> *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U. S. 79, 28 Sup. Ct. Rep. 26, 52 L. ed. 111 (1907), *aff'g* 187 Mass. 436, 73 N. E. 530 (1905).

<sup>20</sup> *Per Miller, J.*, in *Jensen v. South. Pac. Co.*, *supra* Note 1 at 528, 109 N. E. at 604.

<sup>21</sup> *Louis Lizitz Dry Goods Co. v. Yeldell*, 274 U. S. 112 at 116, 47 Sup. Ct. Rep. 509 at 510, 71 L. ed. 952 at 954, 51 A. L. R. 1379 (1927).

not an unreasonable exercise of such legislative prerogative to create a new cause of action against a wrongdoer responsible for death by means of which such wrongdoer is compelled to contribute to the funds employed to effectuate the benevolent and charitable purposes of the Workmen's Compensation Law.

SIDNEY MOERMAN.

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AN APPLICATION OF THE LAW OF CONTRACTS  
FOR PERSONAL SERVICES.

The general rule applicable under common law and under the statutes<sup>1</sup> of the several states is that actions based on contract survive the death of either party and may be enforced by or against his heirs or executors.<sup>2</sup> It is with the exception to this well-established rule that we are concerned—the exception found in contracts involving personal services.<sup>3</sup>

That one may choose with whom he will contract is a basic principle of law. The courts early recognized<sup>4</sup> that when people contract with each other for services essentially personal no assignment or substitution can be satisfactory, and the original party cannot be succeeded by his personal representative. A personal service contract requires the exercise of personal skill and knowledge, it cannot be delegated to another.<sup>5</sup> The long line of authorities has led to the crystallization of the rule in *Lorillard v. Clyde*,<sup>6</sup> followed by later decisions, in which the Court laid the test to determine whether a given case fitted within this exception. The Court said:

“It is well settled that when performance depends on the continued existence of a given person or thing and such continued existence was assumed as the basis of the agreement,

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<sup>1</sup> New York State Decedent Estate Law, Sec. 16, L. 1909, ch. 18.

<sup>2</sup> C. J. 181, Sec. 326; *Livermore v. Bainbridge*, 49 N. Y. 125 (1872); *Zabriski v. Smith*, 13 N. Y. 322, 64 Amer. D. 551 (1855); *Robinson v. Thomas*, 123 App. Div. 411, 107 N. Y. Supp. 110 (1908); *McGregor v. McGregor*, 35 N. Y. 218 (1866); *Allen v. Confederate Pub. Co.*, 49 S. E. 782, 121 Ga. 773 (1905); *White v. Allen*, 133 Mass. 423 (1882); *McCartney v. Corbine's Estate*, 108 Ill. App. 282 (1903).

<sup>3</sup> *Lorillard v. Clyde et al.*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113 (1894); *Dexter v. Norton*, 47 N. Y. 62, 7 Amer. Rep. 415 (1871); *Spaulding v. Rosa*, 71 N. Y. 40, 27 Amer. Rep. 7 (1877); *Wheeler v. Conn. Mut. Life Ins.*, 82 N. Y. 543, 37 Amer. Rep. 549 (1880); *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167 (1896).

<sup>4</sup> *Babcock v. Goodrich*, 3 How. Pr. (N. S.) 52.

<sup>5</sup> 3 Williston, Contracts 3299.

<sup>6</sup> *Supra* Note 3.